Environmental Justice and ICCR

What is environmental justice, and why is environmental justice relevant to ICCR?

The Agency Definition of Environmental Justice

According to U.S. EPA, environmental justice means:

* the fair treatment of people of all races, cultures and incomes with respect to the development, implementation and enforcement of environmental laws, regulations, programs and policies;

* that no racial, ethnic or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from the operation of industrial, municipal and commercial enterprises and from the execution of federal, state and local programs and policies; and,

* that communities, private industries, local governments, states, tribes, federal government, grass roots organizations and individuals act responsibly and ensure environmental protection to all communities. See 58 Fed. Reg. 63955, 63957 (December 3, 1993).

Why is environmental justice relevant to ICCR?

Environmental justice is relevant to all U.S. EPA activities by virtue of Executive Order and well-established Agency policy. In addition, there are specific mandates in the Clean Air Act, including provisions of Section 129 now before the ICCR, which are relevant to environmental justice issues. To the extent U.S. EPA will delegate its responsibilities for implementation and enforcement of combustion emission standards to its State partners, it is authorized to impose and enforce requirements to ensure non-discrimination. Finally, it is anticipated the Agency will issue definitive guidance on the legal requirements arising from its commitment to environmental justice in the near future.

Executive Order 12898

President Clinton signed Executive Order No. 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, on February 11, 1994. 59 Fed. Reg. 7629 (Feb. 16, 1994).

Executive Order No. 12898 does not create a new legal remedy. Reno, Janet. "Department of Justice Guidance Concerning Environmental Justice" (January 9, 1995), p. 2. As an internal

management tool of the Executive Branch, the Order directs Federal agencies to put into place procedures and take actions to make achieving environmental justice part of their basic mission. Id. President Clinton explained that Federal agencies have the responsibility to promote "nondiscrimination in Federal programs substantially affecting human health and the environment." Id. Accordingly, agencies must implement actions to identify and address disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and low-income populations and federally-recognized Indian tribes. Id.

In a memorandum issued contemporaneously with the Order, the President "underscored certain provisions of existing law that can help ensure that all communities and persons across the Nation live in a safe and healthful environment". Id. For example, the Presidential memorandum emphasizes that Title VI of the Civil Rights Act of 1964 provides an opportunity for Federal agencies to address environmental hazards in minority communities and low-income communities. This purpose is accomplished by ensuring compliance with the existing non-discrimination provisions in Federal contracts with State agency partners.

U.S. EPA Policy

U.S. EPA has two overarching goals in relationship to environmental justice. U.S. Environmental Protection Agency, Draft Environmental Justice Strategy for Executive Order 12898 (January, 1995). U.S. EPA's first goal is to ensure that no segment of the population, regardless of race, color, national origin, or income, suffers disproportionately from adverse human health or environmental effects as a result of EPA's policies, programs, and activities Id. "Introduction" by Carol M. Browner.

U.S. EPA's second overarching goal is to ensure that those who must live with environmental decisions - community residents, environmental groups, State, Tribal and local governments, businesses - must have every opportunity for public participation in the making of those decisions. Id. An informed and involved local community is regarded as a necessary and integral part of the process to protect the environment. Id.

Environmental Justice and the Clean Air Act

The connections between the Clean Air Act and environmental justice were first described U.S. EPA during the Bush Administration in a report entitled Environmental Equity - Reducing Risk For All Communities, EPA230-R-92-008, June 1992. Among the

primary factual conclusions of this report is that racial minorities, who live in urban areas in higher percentages than their white counterparts, disproportionately experience the consequences of higher air pollution found in urban settings. The Environmental Equity report concludes:

> *The literature available suggests that exposure, siting, sensitivity, and the distribution of air pollutants raise concerns about equity with respect to air pollution. Available studies do not demonstrate (or even raise the suggestion) that OAR's policies have resulted in differential allocations of environmental benefits. However, the literature examined suggests that racial minority and low-income populations have experienced poorer air quality because they tend to live in urban areas and have in some cases lived in close proximity to air polluting facilities. Also, in some cases, they may be more sensitive to certain air pollutants than the general population.*

In considering this conclusion in light of OAR's opportunities under the 1990 Clean Air Act Amendments, the report observes:

> *To the extent urban air quality is improved via the Act, minority populations will experience higher relative benefits than the general population because of their high representation in urban areas.*

In discussing the effects of regulatory action mandated under the 1990 amendments, the report concludes:

> *The reductions in exposure and associated control costs will in general be distributed widely. However, several of the changes enacted could potentially have greater economic impacts on low-income people than on middle- or high-income groups...Once again, opportunities exist for EPA to include consideration of those racial minority and low-income communities who are at greatest risk than the population as a whole in development of this guidance.*

Environmental Justice and ICCR

The focus of the Air Division's environmental justice opportunities has been in rule development under the Clean Air Act of 1990. These opportunities include considering environmental justice in NSR and PSD permitting, improving public participation under Title V, establishing siting standards for incinerators under

Section 129, revising ambient air quality standards, and incorporating environmental justice into research and regulation of hazardous air pollutants. There are four opportunities which are specifically important for ICCR.

First, Section 129 (a)(3) requires siting requirements for new solid waste burning units which "minimize, on a site specific basis, to the maximum extent practicable, potential risks to public health or the environment." ICCR provides a clear opportunity for rulemaking on this requirement, including the identification of factors and procedures (including enhanced public participation) which must be used in the characterization of risk minimization.

Second, there are opportunities under Sections 112, 129 and 501 to enhance public participation in the permitting of combustors. These opportunities are separately described in a companion background paper entitled Public Participation and ICCR.

Third, because U.S. EPA is authorized to, and anticipates, delegating implementation of combustor rules to States (see 112(l), and, 129(b)(2)), rules developed through ICCR could include terms designed to address disproportionate impact and public participation in subsequent state activities. The Administrator could also independently include these terms in delegation agreements.

Fourth, pursuant to Title VI of the Civil Rights Act of 1964, U.S. EPA must ensure that programs or activities receiving EPA financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that have a discriminatory effect on the basis of race, color or national origin. Memorandum from Jean C. Nelson, General Counsel, to Carol Browner, Administrator, March 17, 1994. As a practical matter, this requires U.S. EPA to enforce a standard provision in its grant agreements with its State-funded partners, in which States agree they -

> *6. Will comply with all Federal statutes relating to non-discrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352)...*

ICCR does not have a mandate related to Title VI. However, two provisions which are directly relevant to ICCR provide a basis for further defining how States can conduct their federally-funded, federally-delegated activities so as to avoid violating non-discrimination requirements.

Section 112(l) indicates that States may develop and submit

programs for the implementation and enforcement of standards established pursuant to Section 112. For her part, the Administrator is required to publish guidance which establishes the criteria through which States can develop and seek approval for these programs. It may be possible for the Administrator to establish environmental justice requirements under Section 112 as part of the delegation of this program to States. The Administrator could use this authority to promulgate requirements which will ensure States are exercising their authority consistently with Title VI and environmental justice.

Section 129(b)(2) indicates that States in which solid waste burning facilities are operating shall submit to the Administrator a plan to implement and enforce Section 129 guidelines. The Administrator is given broad discretion over the approval or disapproval of these mandatory State plans (*See* 40 CRF Part 60, Subpart B, for an example of this process which includes mandatory public participation in the development of a state plan). The standards for approval for new sources must include factors unique to Section 129(a)(3): a determination of methods and technologies for removal or destruction of pollutants before, during and after combustion; and, siting requirements that minimize "to the maximum extent practicable" potential risks to human health and the environment. These unique requirements suggest the Administrator should incorporate guidance on Title VI and environmental justice into the review and approval of state plans to implement and enforce 129(a)(3).

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Why is environmental justice relevant to ICCR?

Environmental justice is relevant to all U.S. EPA activities by virtue of Executive Order and well-established Agency policy. In addition, there are specific mandates in the Clean Air Act, including provisions of Section 129 now before the ICCR, which are relevant to environmental justice issues. To the extent U.S. EPA will delegate its responsibilities for implementation and enforcement of combustion emission standards to its State partners, it is authorized to impose and enforce requirements to ensure non-discrimination. Finally, it is anticipated the Agency will issue definitive guidance on the legal requirements arising from its commitment to environmental justice in the near future.

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First, Section 129 (a)(3) requires siting requirements for new solid waste burning units which "minimize, on a site specific basis, to the maximum extent practicable, potential risks to public health or the environment." ICCR provides a clear opportunity for rulemaking on this requirement, including the identification of factors and procedures (including enhanced public participation) which must be used in the characterization of risk minimization.

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Section 129(b)(2) indicates that States in which solid waste burning facilities are operating shall submit to the Administrator a plan to implement and enforce Section 129 guidelines. The Administrator is given broad discretion over the approval or disapproval of these mandatory State plans (*See* 40 CRF Part 60, Subpart B, for an example of this process which includes mandatory public participation in the development of a state plan). The standards for approval for new sources must include factors unique to Section 129(a)(3): a determination of methods and technologies for removal or destruction of pollutants before, during and after combustion; and, siting requirements that minimize "to the maximum

extent practicable" potential risks to human health and the environment. These unique requirements suggest the Administrator should incorporate guidance on Title VI and environmental justice into the review and approval of state plans to implement and enforce 129(a)(3).

Pollution Prevention and ICCR

What is the basis for pollution prevention to be incorporated as a primary consideration in ICCR standard-setting?

The general purposes of the Clean Air Act dictate that pollution prevention should be a primary consideration in ICCR's standard setting activities. Section 101(c) of the Clean Air Act states:

> *A primary goal of this chapter is to encourage or otherwise promote reasonable Federal, State and local government actions, consistent with the provisions of this chapter, for pollution prevention.*

Pollution prevention also appears in three of four Congressional purposes for the promulgating the Clean Air Act. CAA Section 101 (b)(2),(3) and (4). For example, Section 101 (b)(4) asserts:

> *The purposes of this subchapter are...to encourage and assist the development and operation of regional air pollution prevention and control programs.*

More specifically, as to new solid waste incinerator units, Section 129(a)(3) requires a consideration of "methods and technologies for removal or destruction of pollutants before, during or after combustion...". The specific measures referenced in Section 112(d)(2) also strongly suggest that pollution prevention measures should be carefully evaluated in standard setting for both new and existing sources. Section 112(d)(2) mandates the use of "measures, processes, methods, systems or techniques", including measures which are designed to:

> *...reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials, or other modifications.*

These measures are similar to the description of pollution prevention through source reduction found in the Pollution Prevention Act of 1990. In this Act, source reduction is characterized as:

> *equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training or inventory control.*

The use of such pollution prevention measures are explicitly endorsed by Congress in the Pollution Prevention Act of 1990:

> *The Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible...* 42 U.S.C.A. 13101(b).

Consequently, the use of pollution prevention measures should be directly relevant both to identifying the emissions control achieved by the best controlled similar unit (for new sources), and, the average emissions achieved by the best performing 12 percent of comparable units in any category (for existing sources). Pollution prevention should be relevant to both the determination of the MACT floor and, eventually, MACT.

What are the key issues related to incorporating pollution prevention measures into ICCR's standard-setting activities?

One issue relevant to pollution prevention in the ICCR process is that the MACT determination is driven by emission comparisons among similar existing sources. Simply, the best controlled sources - the mandated benchmarks for standard-setting - may not be using pollution prevention to achieve their results. That is, if low emissions from the best controlled unit(s) in a category are achieved through end-of-the-pipe technologies, pollution prevention strategies may be overlooked despite their potential economic and environmental merits. Nonetheless, as a practical matter, many sources may eventually be driven to consider pollution prevention to attain the emission standards mandated by this rulemaking.

Another issue relevant to pollution prevention in ICCR is that some readily available pollution prevention practices will be properly characterized as "design, equipment, work practice or operational standards". Section 112(D) allows consideration of these measures in standard-setting, but only if the Administrator determines it is not otherwise feasible to prescribe or enforce an emission standard for control of hazardous air pollutants. *see* CAA Section 112(h). In previous, analogous processes, U.S. EPA has taken the position that an analysis of design, equipment, work practice and operational standards can take place in addition to, but not in lieu of, a consideration of emission standards in the

development of regulatory standards.

Finally, a practical issue related to pollution prevention in ICCR is that source workgroups may not assemble sufficient information to demonstrate that the best controlled sources in a category are, in fact, employing pollution prevention. If source work groups are not vigorously seeking to identify pollution prevention practices in their inventorying activities, it will be difficult to promote these measures in subsequent standard-setting discussions.

Public Participation and ICCR

Is there a legal mandate for public participation in the permitting of combustion facilities subject to emission standards under Sections 112 and 129?

Public Participation Under Sections 112 and 129 Will Flow Through Facility Permitting Under Title V of the Clean Air Act

At the conclusion of this rulemaking process, U.S. EPA's final rules will be framed as category-based emission standards. Section 112 and 129 facilities will then be subject to compliance schedules. For example, under Section 112, these schedules should ensure facilities will comply "as expeditiously as practical" with the new regulations, but in no event later than 3 years after the effective date of these standards.

The implementation of the combustor emission standards will flow through the new, federally mandated operating permit program established by the 1990 Clean Air Act, commonly called the Title V Program. That is, regulated facilities will be required to obtain operating permits which demonstrate compliance with the emission standards established through U.S. EPA's rulemaking for combustors.

As a practical matter, in most cases, state agencies have or will have received federal approval for implementing and enforcing Title V. Consequently, state environmental agencies will bear day-to-day responsibility for issuing operating permits which conform with the Section 112 and 129 standards for combustors. Also as result, public participation opportunities will flow through state-approved Title V permitting programs. That is, questions about public participation under Sections 112 and 129 invariably flow into the Title V permitting process because Title V will be the mechanism by which emission standards are implemented on a facility-by-facility basis.

Under Title V, the minimum requirements for public participation include public notice, an opportunity for public comment and a public hearing, and availability to the public of any permit application, compliance plan, permit, and monitoring and compliance report. 42 U.S.C.A. 7661a(b)(6) and 42 U.S.C.A. 7661b(e). A state-approved Title V permitting program must also include "an opportunity for judicial review in State Court of the final permit action by...any person who participated in the public comment process." 42 U.S.C.A. 7661a(b)(6). Within this broad mandate for public participation in the permitting process, each approved State will develop specific implementing programs which must be approved by the U.S. EPA. Consequently, there will be some

state-by-state variations in the opportunities for public participation in the permitting of combustors subject to Section 112 and 129 standards.

Additional Opportunities for Public Participation Under Sections 112 and 129

There is also evidence that Section 112 may, and Section 129 does, mandate additional opportunities for public participation beyond those generically offered under Title V's permitting program.

Section 112(l) indicates that States *may* develop and submit programs for the implementation and enforcement of standards established pursuant to Section 112. For her part, the Administrator is required to publish guidance which establishes the criteria through which States can develop and seek approval for these programs. It may be possible for the Administrator to establish additional public participation requirements under Section 112 as part of the delegation of this program to States. That is, the Administrator may choose to use this authority to promulgate more expansive public participation opportunities for combustors subject to Section 112 than are generically available under Title V.

Section 129(b)(2) indicates that States in which solid waste burning facilities are operating *shall* submit to the Administrator a plan to implement and enforce Section 129 guidelines. The Administrator is given much broader discretion over the approval or disapproval of these mandatory State plans. Moreover, the standards for approval for new sources must include factors unique to Section 129(a)(3): a determination of methods and technologies for removal or destruction of pollutants before, during and after combustion; and, siting requirements that minimize "to the maximum extent practicable" potential risks to human health and the environment. These unique requirements suggest the Administrator should incorporate much broader concepts of public participation than the generic procedures mandated for other facilities subject to the Title V program.